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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 792.

STEEL EQUIPMENT COMPANY, and
BROADROCK DEVELOPMENT CORPORATION,

Petitioners,

vs.

EDWIN A. EBERHART,
Special Agent of the Intelligence Division of the Internal Revenue Service of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

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EDWIN A. EBERHART,
Special Agent of the Intelligence Division of the
Internal Revenue Service of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

The Steel Equipment Company and Broadrock Development Corporation respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

In this judgment the Court of Appeals affirmed the order of the District Court for petitioners to produce for examination books, records and papers from 1950 through 1957 (Appendix, page 32, *infra*).

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 296 Fed. (2d) 685, and appears in the appendix hereto at page 30. The oral opinion of the District Judge is set out in the Transcript of Record at page 30a.

JURISDICTION.

The within Petition requests review of an order of the United States Court of Appeals for the Sixth Judicial Circuit affirming the order of the United States District Court, for the Northern District of Ohio, Eastern Division, to produce for examination books, records and papers from 1950 through 1957. The order of the Court of Appeals was made and entered December 14, 1961.

No order for rehearing has been entered, and no extension respecting the within Petition for review by certiorari has been sought.

Jurisdiction to review the judgment heretofore entered by the Sixth Circuit Court of Appeals below is found in Title 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Can the Special Agent for Director of Internal Revenue examine tax years 1950 through 1956 when 1950, 1953, 1954 and 1955 have been audited in prior examinations and under the Internal Revenue Code are all barred by limitations on assessments, collections and further investigation?

2. Did the Director of Internal Revenue carry his burden to show that the examination was not unnecessary, unreasonable, and beyond the scope of the limitations imposed upon the Commissioner of Internal Revenue?

3. Is the request of the Commissioner for production of petitioners' records for the years 1950 to 1956 inclusive an unreasonable search under the Fourth Amendment of the United States Constitution when the years were barred by the statutes of limitations?

4. Since a corporation is a person under Ohio law and the Internal Revenue Code; and Article I, Section 8 Cl. 3 United States Constitution and the Fourth and Fourteenth Amendments to United States Constitution and within the meaning of *Erie Railroad vs. Tompkins*, 304 U. S. 64, are the petitioner corporations protected under the Fifth Amendment to the United States Constitution?

CONSTITUTION AND STATUTES INVOLVED.

United States Constitution
Amendment 4.

Unreasonable Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment 5.

Criminal Actions—Provisions Concerning Due Process of Law and Just Compensation Clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT 14, SECTION 1.

DUE PROCESS AND EQUAL PROTECTION OF LAWS.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION
ARTICLE 1, SECTION 8, CLAUSE 3.

POWER OF CONGRESS TO REGULATE COMMERCE.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

INTERNAL REVENUE CODE OF 1954, SECTION 6501 (a) and (c). (Similar to Sections 275(a) and 276(a) 1939 Internal Revenue Code.)

LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed or, if the tax is payable by stamp, within three years after such tax became due, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(c) EXCEPTIONS.—FALSE RETURN. In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time. (26 U. S. C. 1958 ed., Sec. 6501.)

INTERNAL REVENUE CODE OF 1954, SECTION 7605 (b). (Similar to Section 3631 Internal Revenue Code of 1939.)

RESTRICTIONS ON EXAMINATION OF TAXPAYER.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. (26 U. S. C. 1958 ed., Sec. 7605.)

SECTION 7701 DEFINITIONS. Internal Revenue Code of 1954, Sec. 7701 (a). (Similar to Section 1426(F) Internal Revenue Code of 1939.)

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) Person.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

TITLE 28, SECTION 1652.

STATE LAWS AS RULES OF DECISION. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, c. 646, 1, 62 Stat. 944.)

STATEMENT OF THE CASE.

On December 4, 1958 a Special Agent of the Internal Revenue Service, Edwin A. Eberhart, was assigned to examine the income tax returns of the Steel Equipment Company for the years 1950 through 1957. Mr. Eberhart conferred with Internal Revenue Agent Drummond later in December of 1958. On January 14, 1959 Mr. Drummond appeared at the offices of the Steel Equipment Company and requested permission to examine the records of the company for years 1956 and 1957. (Undisputed 12a, 15a.) These records were made available to Mr. Drummond by officers and employees of the Steel Equipment Company as well as many records for prior years. (12a.) Some of these records went back as far as the year 1947, and were seen and made available to Drummond. (14a, 15a, 16a, 25a.) Mr. Drummond made photostatic copies of travel records, transcribed cancelled checks, examined the general ledgers, etc. No requests for records were denied to him. (11a, 13a). In 1959 Mr. Drummond visited the offices of the Steel Equipment Company and examined books and records on the following dates: January 14, 15, 16, 19, 21, 22, 26, 28, 30, February 4, 9, 13, 25, and 26. (Undisputed facts, 14a, 15a, 16a, 25a.)

On February 25, 1959 Mr. Drummond brought with him to the office of the Steel Equipment Company, Special Agent Eberhart and said that because he, Drummond, was required to attend a training school Mr. Eberhart would replace him and continue the investigation. (Undisputed 13a.)

Mr. Eberhart continued the examination of the records of the Steel Equipment Company and in 1959 visited the offices of the company on the following dates: February 25, 26, March 3, 4, 9, 10, 11, 12, May 6 and 8. (Undisputed, 18a.)

On or about May 8, 1959 when the officers of the Steel Equipment Company learned that Mr. Eberhart was a Special Agent, and after Mr. Eberhart began to ask for more records for years prior to 1955, the company declined to produce any further data or records for the agent's examination. (Undisputed 2a, 3a, 5a.)

On May 11, 1959 a Commissioner's Summons was issued requesting the Steel Equipment Company to produce its records for the periods 1950 to 1957 inclusive. (2a, 3a.) On June 10, 1959 a petition to quash the summons and for a restraining order was filed in the Federal District Court for the Northern District of Ohio by the Steel Equipment Company. A motion for summary judgment filed by the Director of Internal Revenue on August 6, 1959 was granted by the District Court on September 28, 1959. The Steel Equipment Company appealed to the Sixth Circuit Court of the U. S. which appeal was denied on October 22, 1960 after hearing. (Undisputed.)

On December 12, 1960 a summons was served upon the attorney for the Steel Equipment Company, again requesting production of its records for the years 1950 to 1957 inclusive. (Undisputed.) When the Steel Equipment Company failed to comply with this summons a complaint was filed by Special Agent Eberhart requesting that the court issue a show cause order to the Steel Equipment Company for failure to comply with the said summons. On February 3, 6 and 7, 1961 a hearing was held after which it was ordered by the Federal District Court that the defendant produce the documents requested in the said summons on February 21, 1961. On February 15, 1961 a notice of appeal was filed by the Steel Equipment Company. (5a, 6a.)

The income tax return of the Steel Equipment Company for the year 1950 was examined in 1952 by the Inter-

nal Revenue Service. On August 25, 1952 the Internal Revenue Service advised the Steel Equipment Company that its 1950 return was accepted as filed. (Exh. B, 18a.)

The income tax returns of the Steel Equipment Company for the years 1953, 1954 and 1955 were examined by the Internal Revenue Service and on January 28, 1957 the Revenue Service made a finding of no change for the year 1953, a deficiency of $30,436.70 for the year 1954, and a reduction of the Loss claimed for the year 1955. The changes made for the years 1954 and 1955 were the result of an adjustment to the depreciation expenses claimed on some equipment. There were no changes made in the travel and entertainment expense items for any of these three years. (Exh. C, 13a, 14a.)

After the examinations by Mr. Drummond and Mr. Eberhart during 1959, Statutory Notices of deficiencies were issued to the Steel Equipment Company for the year 1956, the adjustments being predicated upon disallowances of all travel and entertainment expenses which had been claimed and reimbursed to the President and Vice President of the company. A Statutory Notice was issued for the years 1953 and 1954 to the Steel Equipment Company wherein all travel and entertainment expenses were disallowed. (Exh. D, 16a.)

Carl W. Overson, a public accountant for over 42 years, was employed by the Steel Equipment Company to keep its books from 1944 to 1959. He had had broad experience in Federal income tax matters. He set up the books and records of the Steel Equipment Company. He initiated the procedures in keeping records of travel expenses. During the first examination of the Steel Equipment Company by the Internal Revenue Service for 1950, no question was raised concerning travel expenses. Everything was accepted as shown in the books. (26a.)

Mr. Overson knew that the business of the Steel Equipment Company required a large amount of travel because most of its customers were outside Cleveland. (26a.) Mr. Keller did a great deal of traveling as a salesman-engineer. (26a, 28a.) Mr. Keller and Mr. Burdick did most of the traveling for the company. (27a.) In 1955, the company had about 1500 proposals submitted to potential customers. (27a.) Many proposals did not result in orders. In 1955, 340 orders were received. (27a.) Travel expense on proposals were charged to travel and entertainment expense. If an order were received, future travel expenses in connection with the order were charged to "Shop Order." (28a.) Mr. Burdick did most of the traveling in connection with orders after they were received. (27a.) Therefore, most of his travel expense was charged to shop orders, each designated by number. (28a.) In the shop order file a complete breakdown of the expenses was shown. (28a.) Other employees of the company often traveled with Mr. Keller and Mr. Burdick. (28a.)

The travel records for 1953, 1954 and 1955 were accepted by the Internal Revenue examiner. (Exh. C, 23a.) The prior revenue reports indicate that the Steel Equipment Company attempted to keep its records in the manner required by Internal Revenue. (17a.)

In December, 1958 the office of the company was broken into at night. (20a.) Papers and records from the files were scattered on the floor. Some records were lost or misfiled. (30a.)

The summons served by the Internal Revenue Service on the Broadrock Development Corporation involved only the years 1956 and 1957. Although the summons in question is entitled "In the matter of the civil liabilities of the Broadrock Corporation," the affidavit of Special Agent

Eberhart states that it was the civil liability of an individual, F. Jules Keller which was being investigated.

Basis for federal jurisdiction in the court of first instance is 26 USC 1958 ed., Section 7604.

The Court of Appeals, Sixth Circuit, affirmed the lower court's decision on December 14, 1961.

REASONS FOR GRANTING THE WRIT.

A Writ of Certiorari should be granted in this matter because your petitioners have been denied due process of law; there is conflict with the decisions of other Courts of Appeals; this important question involving taxpayers' rights has not been ruled on by this Court; the decision of the Circuit Court of Appeals has been decided in a way in conflict with applicable decisions of this Court; and the Circuit Court of Appeals has sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

ARGUMENT.

1. Can the Special Agent for Director of Internal Revenue examine tax years 1950 through 1956 when 1950, 1953, 1954 and 1955 have been audited in prior examinations and under the Internal Revenue Code are all barred by limitations on assessments, collections and further investigation?

Ordinarily a tax must be assessed within 3 years after a return is filed. The Internal Revenue Code of 1954, Sec. 6501(a) states:

> "General Rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court, without assessment for the collection of such tax shall be begun after the expiration of such period." Similar to Sec. 275(a) of the Internal Revenue Code of 1939.

Since the return for 1955 was filed March 16, 1956, the three year limitation expired on April 16, 1959. All years prior to 1955 were barred under the three year rule. The Internal Revenue Code of 1954, Sec. 7605(b) states:

> "Restrictions on Examination of Taxpayer. No taxpayer shall be subjected to unnecessary examination or investigations and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation notifies the taxpayer in writing that an additional inspection is necessary." Similar to Sec. 3631 of the 1939 Internal Revenue Code.

This section thus provides that no taxpayer shall be subjected to unnecessary examination or investigations and only one inspection of a taxpayer's books of account shall

be made for each taxable year unless the taxpayer is notified such an inspection is necessary.

Where tax liability is ordinarily barred by Statute of Limitations, burden is on Government to show examination is not unnecessary.

In Re House, 144 F. Supp. 95, U. S. D. Ct. N. D. Cal. S. D., 50 AFTR 337:

Syll. 3:

"Where the government seeks to examine documents relating to a period for which tax liability is ordinarily barred by statute of limitations, burden is on government to show why such examination is not 'unnecessary,' under statute barring unnecessary examinations and investigations by government. 26 U. S. C. A. (I. R. C. 1954) 7602, 7604, 7605(b)."

Page 103:

"The zealous prosecution of violation of the criminal laws is the business of the government. But the zealous protection of the liberties of the people should be equally the concern of the government. The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self incrimination in this field has a great and fateful consequence upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life."

In the case of *George D. Martin vs. Chandis Securities Company*, 128 Fed. 2d 731, 42-2 U. S. T. C. 9521, the Ninth Circuit Court of Appeals on May 29, 1942, affirmed a District Court order quashing an order it had previously issued requiring appellee to appear on a specified date and produce certain records of Chandis Securities Company.

The headnote of this case is as follows:

"Examination of corporate records in determining stockholder's liability. The collector may not examine the books of a corporation in determining the tax liability of one of its stockholders where such examination is not necessary. The evidence not showing any reasonable ground for suspicion of fraud and the period of limitation on the collection of taxes having run, the court concludes that an examination of the corporate books is not necessary, and that the collector's Petition for production of records be denied.

The District Court quashed and annulled its previous order of March 5, 1940 ordering the production of records, on the ground among others, that the petition and affidavit failed to state facts sufficient to show grounds of suspicion or of probable cause for fraud and that the necessity for the examination was not shown. In the absence of fraud, the statute of limitations had run.

The Circuit Court, in sustaining the lower court, relied upon Section 3631 of the Internal Revenue Code (similar to section 7605(b) of the 1954 Code) which states in part 'no taxpayer shall be subject to unnecessary examinations or investigations * * *.' The Court of Appeals in its opinion stated in part 'The complaint alleged that the income tax return of the wife for 1930 was being investigated, that the summons had been issued and that appellees refused to obey the same. Since collection of taxes for 1930 could not be had without assessment and since assessment had long been barred by the Statute of Limitations (Revenue Act of 1928, para. 275, Stat. 791) the complaint wholly failed to state any facts showing that the proposed investigation was not unnecessary" as provided in Internal Revenue Code para. 3631. The order, therefore, should not have been made.'

In describing the reasonable grounds for suspicion of fraud the court said that the appellant's contention that the only showing required is a showing of probable cause, sometimes called reasonable ground

for suspicion of fraud. Appropriately, the trial court held that the evidence did not show this.

The Circuit Court discussed Section 3631 (now section 7605(b) and raised the question of whether it was a limitation on the power of the Bureau or merely a personal right available only to a taxpayer. The Court stated as follows:

> 'We believe it is the former and that the Bureau has no power to make an unnecessary examination or investigation. There is no contention that authority for the examination and investigation may be found independently of the statutes cited. We believe such statutes, however, authorize only a "necessary" examination or investigation. Therefore, appellants have no right to make the examination or investigation here involved and unless he can show he has the right he is not entitled to relief.' "

It is clear that the burden was on the Director of Internal Revenue to prove by facts that an examination of the barred years 1950 through 1955 was necessary. Since the facts proven at the hearing at most indicated a lack of supporting data for travel expenses claimed, there is no proof of a basis for suspicion of fraud. The evidence of lack of corroboration presented applied only to 1956 and 1957. There was no evidence relating to 1950 to 1955 inclusive. It was not necessary, of course, for the Director to prove fraud but under the case law he must show some basis for a suspicion of fraud. Even proof of a lack of corroborating or supporting evidence would not be sufficient to establish fraud and therefore can hardly be the basis for a suspicion of fraud.

Special Agent Eberhart admitted in his testimony that some of the travel and entertainment expenses were corroborated and that his investigation had indicated some additional corroboration (24a). It is apparent that the supporting data concerning travel and entertainment ex-

penses which could not be located at the time of the investigation by Mr. Drummond and Mr. Eberhart were available in sufficient quantities in prior years to satisfy the agents making the prior examinations. The absence of this data in 1959 should not be sufficient to support a suspicion of fraud for the years previously accepted. Furthermore, there were some supporting data in the records of the Steel Equipment Company in the form of receipts (Exh. K, L 30a). In addition to that the monthly claims for reimbursement filed by the two officers, Keller and Burdick, constituted some corroboration. These monthly claim statements, which were belittled by the agents, in most instances set forth the date and the places visited (24a). When automobiles were used for travel the mileage was shown (21a). Special Agent Eberhart admitted that there could not be much more corroboration in instances where one day trips were taken (23a). Prior to the year 1956 charges were made to shop orders or the date and place visited shown. At all times Mr. Overson, an accountant of long experience, made every effort to comply with the Internal Revenue Service requirements as to the keeping of travel records (17a). Mr. Overson was satisfied with the records submitted by Mr. Keller and Mr. Burdick and had every right to be so satisfied since no disallowances of these expenses had ever been made after they were checked by a revenue agent (23a). He had knowledge of the need for travel and business entertainment by Keller and Burdick (26a, 27a). Keller and Burdick furnished him receipts for 80% of the travel and entertainment expenses claimed (30a).

After the burglary in December, 1958, in the office of the Steel Equipment Company many records were lost or misfiled (30a). It is not known whether some of these supporting travel records were among the missing docu-

ments, but it appears likely. In any event, their absence in the years barred by the Statute of Limitations would not seem to furnish reasonable grounds for a suspicion of fraud.

The cooperation of the Steel Equipment Company with the Internal Revenue Service is unquestioned in years prior to 1959. The records and the returns for the prior years were examined by various revenue agents who allowed in full the travel and entertainment expenses deducted (23a).

During the year 1959 there was full cooperation with the Revenue Agents from January 14, 1959 until May 8, 1959. (25a.) At that time the Steel Equipment Company ceased to cooperate because it was convinced that the activities and behavior of the Internal Revenue Service in continuing repetitive examinations was unreasonable.

Revenue Agent Drummond and Special Agent Eberhart examined the records of the Steel Equipment Company intermittently from January 14, 1959 to May 8, 1959 looking at records covering the years 1947 to 1957 inclusive (14a, 15a, 16a, 25a). Until March 24, 1959 when a reopening letter was served on the taxpayer, the examination of years prior to 1955 which had been previously examined was illegal and contrary to the requirements of Section 7605(b) of the Internal Revenue Code of 1954 and Section 3631 of the Internal Revenue Code of 1939. Under the laws and the regulations, therefore, the examination and investigation of the records from 1947 to 1954 was unauthorized and illegal.

Under the theory of *Corbin Deposit Bank vs. United States*, 244 F. (2) 177, in order for the Internal Revenue Service to re-examine years barred by the Statute of Limitations it is necessary for the Service to show a reasonable basis for a suspicion of fraud. In this case it was

held that testimony of the Internal Revenue Agent who enumerated facts showing reasonable grounds for suspicion of fraud was sufficient to reopen for investigation years otherwise barred by the Statute of Limitations. The *Corbin Deposit Bank* case has been followed in many other cases. In *Zimmerman vs. Wilson*, 81 Fed. (2d) 847, the court held that where the testimony of the agents gave no facts to form a reasonable basis for suspicion of fraud, the lower court was justified in enjoining the Internal Revenue from carrying on its investigation of statute barred years.

A similar case was followed in *Arend vs. DeMasters*, 181 Fed. Supp. 761 where the District Court for the District of Oregon issued an injunction to protect the taxpayers from unreasonable and irreparable damage. In this case the Internal Revenue attempted to investigate statute barred years and the only statement concerning fraud was an affidavit from the Revenue Agent in which he contended there was fraud but did not set forth any facts to support such a suspicion. In the present case there was absolutely no testimony offered by the government which would indicate any grounds for suspicion of fraud for the years 1950 to 1955 inclusive. In contrast to this the appellant's uncontradicted evidence is that the years 1950, 1953, 1954 and 1955 had been thoroughly examined by agents of the Internal Revenue Service, its Books inspected and its returns accepted as filed with the exception of minor changes to depreciation for the year 1954. (13a, Exh. C.) The travel expenses were approved after these examinations for the years 1950, 1953, 1954 and 1955. (Exh. B, C, 13a, 14a.) Thus, the evidence submitted by the government to the District Court contains no basis whatsoever for a suspicion of fraud. To the contrary, because of the approval from prior examinations it indicates accurate returns.

The District Court in its decision referred to Exhibits "F" and "H" which were the travel claims of Mr. Burdick for the months of May, 1956 and January, 1957. (31a.) The court in referring to these exhibits specifically mentioned the meals charged and stated that they seemed exceedingly high. The trial court failed to refer to the statements of Mr. Overson that Mr. Keller and Mr. Burdick both traveled many times with other employees from their company. Regardless of this oversight the court did base its findings of suspicion on the evidence produced for the years 1956 and 1957. Such a finding for the years 1956 and 1957 should not affect the years 1950 to 1955 since the evidence is not material or relevant to these years. In fact, the evidence as to the years 1950, 1953, 1954 and 1955 that these years had been examined and approved by the Internal Revenue Service should be conclusive in the absence of some evidence indicating error on the returns for those years.

Under all the facts and circumstances it is believed that the trial court erred and that its findings of facts were clearly erroneous, that the facts as found were not sufficient to support its order to the Defendant-Appellant to comply with the summons in question. It is obvious from the prior reports that the meals charged to travel and entertainment expense did not appear too high to the revenue agents who examined the years prior to 1956.

2. Did the Director of Internal Revenue carry his burden to show that the examination was not unnecessary, unreasonable, and beyond the scope of the limitations imposed upon the Commissioner of Internal Revenue?

This taxpayer has been subjected to three separate examinations by the Internal Revenue Service since 1950. There was the examination of its 1950 return in 1952 (Exh. B), the examination of the 1953, 1954 and 1955 returns in 1956 (Exh. C) and the examination by Mr. Drummond and Mr. Eberhart from January 14 to May 8, 1959. It is difficult to comprehend the necessity for a further examination of the taxpayer's books and records for the same years again. One purpose of the Statute of Limitations is to permit a taxpayer to safely dispose of voluminous business records after the passage of time and to protect him against unreasonable requests for details connected with business transactions which may no longer be available due to the passage of time, lack of records, the failure of witnesses' memories and the disappearance of witnesses.

The Circuit Court of Appeals found there "was some testimony as to lack of records to support the deductions claimed for travel expenses in previous years" to support the District Judge that there was an inference of fraud.

The testimony of Special Agent Eberhart at Page 128 of the Transcript (not heretofore printed) was:

> "The Witness: Your Honor, we didn't get into documentation on the 1955 year."

To Questions of the District Court to Mr. Carl Overson, former Accountant called as a witness for Petitioners as shown at page 158 of the Transcript (not heretofore printed).

"Question. Do you know whether any records were lost for the earlier years before 1956?

Answer. After the acceptance by the Federal investigation of prior to 1955 records, the supporting evidence, in order to conserve space, and some papers that was not needed, were destroyed."

Thus from the above testimony of the Special Agent and of the Accountant there is no basis for a suspicion of fraud in the years prior to 1956. The *District Court's* reliance on this testimony is clearly erroneous and the *Circuit* Court should have so found.

In *Martin vs. Chandis Securities Company,* 33 Fed. Supp. 478, affirmed in 128 F. (2) 731, it was held that the burden is on the Internal Revenue Service to show the necessity of an examination of the tax years barred by the Statute of Limitations.

In this case the agents of the Internal Revenue Service who testified, merely stated that they were reopening the Statute barred years because they found no corroborating data for some travel and entertainment expenses claimed by the taxpayer. (17a.) There was no allegation nor was there any evidence introduced to show that any claims for travel and entertainment were false or fraudulent. In the absence of such evidence the Director has failed to carry his burden of proof.

Corbin Deposit Bank vs. United States, 244 F. 2 177;

Zimmerman vs. Wilson, 81 F. 2 847.

3. Is the request of the Commissioner for production of petitioners' records for the years 1950 to 1956 inclusive an unreasonable search under the Fourth Amendment of the United States Constitution when the years were barred by the statutes of limitations?

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. Includes corporations as being "the people."

Silverthorne Lumber Co. vs. United States, 251 U. S. 385 (1-26-1920), 3 AFTR 3016:

> Syll: "The rights of a corporation against unlawful search and seizure are to be protected even if it be not protected by the Fifth Amendment from compulsory production of incriminating documents."
>
> Page 392: "In *Linn vs. United States*, 251 F. Rep. 476, 480, it was thought that a different rule applied to a corporation; on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

Union Pacific Railroad vs. United States, 99 U. S. 700 (Oct. 1878). Justice Bradley at page 744:

> "And a law which violates the spirit of the constitution is as much unconstitutional as one that violates its letter."
>
> "A corporation was entitled to claim protection of this amendment forbidding unreasonable searches and seizures."

U. S. vs. Sheba Bracelets, Inc., C. A. N. Y. 1957, 248 F. (2nd) 134.

Worthington vs. U. S., C. C. A. Mich. 1948, 166 F. 2d 557:

"A corporation, as well as individuals, is entitled to protection against illegal search and seizure."

U. S. vs. Antonelli Fireworks Co., Dec. N. Y. 1943, 53 F. Supp. 870:

"The constitutional prohibition against unreasonable searches and seizures of its papers inures to corporation."

Hale vs. Henkel, 201 U..S. 43, Oct. term 1905, page 76:

"* * * we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against unreasonable searches and seizures."

A corporation is after all, but an association of individuals under an assumed name and with a distinct legal entity.

Boyd v. United States, 116 U. S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed; their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. Justice Bradley said in part (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally

construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

In *U. S. v. Kupper*, 179 Fed. Supp. 264, the taxpayer was indicted on 42 counts of preparing false income tax returns. The defense filed a motion to suppress evidence on the ground that such evidence was obtained by government agents in a search without a warrant of taxpayer's hotel room. The U. S. District Court for the Eastern District of Pennsylvania denied the motion to suppress on the ground that the evidence secured in the illegal search had not been used to support the indictment, but the court in its opinion stated that if the evidence secured by the illegal search constituted any part of the government's case the motion would have been granted. It stated that general exploratory searches without a warrant are forbidden and even with a search warrant purely evidentiary matters cannot be searched for and seized. The court quoted as authority for this *Gouled vs. U. S.*, 255 U. S. 298, and *Silverthorne Lumber Company vs. U. S.*, 251 U. S. 385.

In this case it appears that the Internal Revenue Service is conducting a purely exploratory search and is seeking evidentiary matter in years now barred by the Statute of Limitations.

Since the Plaintiff-Appellee has not shown any facts which would entitle him to look at the barred tax years, has not shown that his summons was not unnecessary, and was not unreasonable, the taxpayer is entitled to the protection of the Fourth Amendment against this unreasonable search.

First National Bank of Mobile v. U. S., 160 F. (2) 532 held that a request for records by the Internal Revenue Service was a "fishing expedition" and therefore unreasonable.

4. Since a corporation is a person under Ohio law and the Internal Revenue Code; and Article I, Section 8, Cl. 3 United States Constitution and the Fourth and Fourteenth Amendments to United States Constitution and within the meaning of Erie Railroad vs. Tompkins, 304 U. S. 64, are the petitioner corporations protected under the Fifth Amendment to the United States Constitution?

Subpoena is a violation of Fifth Amendment to United States Constitution, particularly that part of the text which reads:

> "* * * nor shall (any person) be compelled in any criminal case to be a witness against himself * * *."

While some cases since *Hale v. Henkle*, 201 U. S. 43, Oct. term 1905, seemingly hold that a corporation is not a "person" within the meaning of the Fifth Amendment, it is here contended that a corporation is a "person" under the ruling of the United States Supreme Court in *Erie Railroad vs. Tompkins*, 304 U. S. 64; 114 A. L. R. 1487. Justice Brandeis at page 1492:

> Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or

"general," be they comm rcial law or a part of the law of torts. And no clause .n the Constitution purports to confer such a power upon the federal courts.

This decision was based on Act of September 24, 1789, c. 20 Section 34, 1 Statute 92, present day section is Title 28, section 1652.

Cleveland Electric Illuminating Company vs. Hitchens, 3 N. P. (N. S.) 57 affirmed in 160 C. C. (N. S.) 532 was an Ohio case where the Cleveland Electric Illuminating Company was suspected of bribing councilmen of the City of Cleveland. The Illuminating Company records were subpoenaed. The company resisted the summons on the ground that the production of the records might incriminate the company. The courts upheld the constitutional rights of the company to withhold the records.

12 *O. J.* 2nd Corporations.

"Paragraph 376. 'Person' or 'Whoever' as Used in Criminal Statutes as Including Corporations.

The enormous multiplication of corporations has led to a recognition of the fact that the corporation must be made amenable to the criminal laws of the state. As a step in this direction it is now provided that indicted corporations may now be brought before the court by service of summons upon the corporation. Moreover, the Revised Code now contains a provision to the effect that as used therein, unless the context otherwise requires, the words, 'whoever' and 'person' include all persons, natural and artificial.' Accordingly, it would appear that unless the language of a particular penal statute excludes corporations, either expressly or because of the type of punishment involved, corporations are amenable thereto.' This doctrine represents a reversal of the rule which had prevailed in some of the courts.

Notes 1, 2 and 3:

I.R.C. 1.02.

The word 'whoever' has been said to be synonymous with the word 'person' when used in a penal statute. *Leo Ebert Brewing Co. v. State*, 2 O. C. C. N. S. 537, 25 O. C. C. 601, aff'd as to corporate defendant and rev'd. as to individual defendant in 71 O. S. 476, 74 N. E. 1141; *Parkway Cabs, Inc. v. Cincinnati*, 52 O. App. 195, 6 O. Ops. 296, 21 O. L. Abs. 27, 3 N. E. 2d 630.

2. *Black, Interpretation of Laws* 138.

'The word "person" is a general or generic term. Hence, when used in a statute, it embraces not only natural persons, but also artificial persons, such as private corporations, unless the context indicates that it was used in a more limited sense, or the subject matter of the act leads to a different conclusion. That is to say, it applies to all corporations in all circumstances where it can reasonably and logically so apply.'

And see *Bridgeport v. Fraternal Order of Eagles*, 97 O. App. 245, 56 O. Ops. 33, 125 N. E. 2d. 202, wherein it is said: 'The word "whoever" used in the ordinance can mean only a natural person or a corporation,' and not an unincorporated voluntary association.

3. *Parkway Cabs, Inc. v. Cincinnati*, 52 O. App. 195, 6 O. Ops. 296, 21 O. L. Abs. 27, 3 N. E. 2d 630; *Hargo v. Meyers & L.*, 4 O. C. C. 275, 2 O. D. 543."

It is here contended that the law of Ohio holds that a corporation is a person and that under the Erie Railroad case the Federal Courts must so hold.

In other provisions of the Constitution, corporation is a "person."

(1) *Hale vs. Henkel*, 201 U. S. 43, stated:

"we do not wish to be understood that a corporation is not entitled to immunity under the Fourth Amendment, * * *"

(2) Corporation within protection of Article I, Section 8, of the United States Constitution.

"To regulate Commerce with foreign nations, and among the several states; and with the Indian Tribes.

"In carrying on foreign and interstate commerce, corporation, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments. Stockton vs. Baltimore Elec. R. Co. C. C. N. J. 1887, 32 F. 9 appeal dismissed 11 S. Ct. 1028, 140 U. S. 599, 35 L. Ed. 603.

"In carrying on of Interstate Commerce, corporations are guaranteed the same rights and are entitled to the same protection as individuals. The Supreme Court in Gloucester Ferry Co. vs. Penn. 114 U. S. 204, Pa. 1885, 5 S. Ct. 826, 29 L. Ed. 158, expressly held that it did not make any difference whether such commerce is carried on by individuals or corporations." *McNaughlon Co. vs. McGirl*, 1897, 49 P. 651, 20 Mont. 124, 128, 63 Am. St. Rep. 610, 38 L. R. A. 210.

(3) A corporation is person within meaning of the 14th Amendment.

Gulf, Col. & S. F. R. R. vs. Ellis, 165 U. S. 150, 1-18-1897 at page 154:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. Santa Clara County vs. Southern Pacific R. R. 118 U. S. 394; Pembina Mining Co. vs. Penn. 127 U. S. 181, 189; Mo. Pac. R. R. vs. Machez. 127 U. S. 205; Minn. & St.

L. R. R. vs. Herrick, 127 U. S. 210; Minn. & St. L. R. R. vs. Beckworth, 129 U. S. 26; Charlotte & Columbia R. R. vs. Gibbs, 142 U. S. 386; Covington & Lexington Turnpike vs. Sanford, 164 U. S. 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

State of Tenn. vs. U. S. et al., U. S. C. of A. 6 Circuit—May 26, 1957, 256 F. 2nd 244 recognized the right of Southern Bell Telephone to compensation.

Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S. 226 (3-1-1897):

Motion to dismiss for want of jurisdiction because a corporation was dismissed. Court held corporation was within meaning of Fourteenth Amendment.

Internal Revenue Code 1954. Section 7701 (a).

"(1) Person. The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

Revenue Act of 1918. "Section 1. * * *

The term 'person' includes partnerships and corporations as well as individuals."

CONCLUSION.

It is respectfully submitted that your petitioner has been denied a fair hearing, has been denied due process of law, and that the Decision and Order of the respondent is not sustained by any substantial evidence, and that by reason thereof your petitioner requests this Court to grant a Writ of Certiorari to the Court of Appeals, Sixth Circuit, in this matter so that this Court shall hear this matter on its merits.

Respectfully submitted,

JOHN KENNEDY LYNCH,
Attorney for Petitioner.

RAYMOND E. COOKSTON,
Of Counsel.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, NOS. 14562, 14563.

(Decided December 14, 1961.)

Before: WEICK and O'SULLIVAN, Circuit Judges and DARR, District Judge.

PER CURIAM. These appeals are from orders of the District Court requiring appellants to obey summons issued by a special agent of the Intelligence Division of the Internal Revenue Service pursuant to 26 U. S. C. 1958 ed. Sec. 6501 which required the appearance and production of corporate books and records.

The special agent filed affidavits indicating his belief that the principal officer and stockholder of the corporations had transactions with them which resulted in taxable income to him which was fraudulently omitted from his 1956 and 1957 income tax returns.

A hearing was conducted by the District Judge at which testimony was taken in behalf of the Government and the defendants. At the conclusion of the hearing the District Judge found that special agent had reason to suspect that there was fraud in the handling of travel expenses and he entered the orders from which these appeals have been taken.

No previous examination had been made of the books and records of the Development Corporation.

In the Steel Equipment case, it is contended that the examination was unnecessary because the corporation's books had previously been examined and that the statute of limitations had run with respect to the year 1955 and previous years. 26 U. S. C. 1958 ed. Sec. 7605; 26 U. S. C. 1958 ed. Sec. 6501. The Secretary or his delegate had

served a letter notifying the corporation that an additional inspection of the records was necessary. This letter was sufficient under the statute to authorize the examination with respect to the years 1956 and 1957. The question remains whether inspection of records for the years allegedly barred by the statute of limitations was necessary. The statute of limitations does not apply to fraudulent returns 26 U. S. C. Sec. 6501(c).

While the evidence with respect to the fraudulent travel expenses concerned the tax years 1956 and 1957, there was also some testimony as to lack of records to support the deductions claimed for travel expenses in previous years. The District Judge did not limit the investigation to the later years as there was at least an inference that fraud extended into some of the previous years. In our judgment, this was sufficient to authorize the examinations. *Foster v. United States*, 265 F. 2d 183 (CA 2); *Corbin Deposit Bank v. United States*, 244 F. 2d 177 (CA 6); *Peoples Deposit Bank & Trust Co. v. United States*, 212 F. 2d 86 (CA 6). The findings of fact of the District Judge as well as inferences drawn therefrom are binding on us unless clearly erroneous. *Commissioner v. Duberstein*, 363 U. S. 278. We do not find them clearly erroneous.

There is no merit in the contention that the Fourth and Fifth Amendments to the Constitution were violated. *United States v. Wallace*, 336 U. S. 793; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186; *United States v. White*, 322 U. S. 694; *Goldberg v. Truck Drivers Local Union No. 299, etc.*, F. 2d (CA 6).

The orders of the District Court are affirmed.

JUDGMENT, Nos. 14,562 and 14,563.

December 14, 1961.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry.

/s/ PAUL C. WEICK,

United States Circuit Judge.